

OCA 87-2594
17 June 1987

MEMORANDUM FOR THE RECORD

SUBJECT: Proposed GAO Audit Bill

1. On 17 June 1987, I telephoned Britt Snider of the Senate Select Committee on Intelligence (SSCI) to ascertain whether he was aware that the above-captioned bill, to be introduced in the near future by Senator John Glenn (D., OH), would be referred to the SSCI. He was aware and explained that he expected it to be sequentially referred to that committee. This means that after the Senate Governmental Affairs Committee reports it out, the SSCI also has the opportunity to report on it. He fully expects Governmental Affairs to report the bill out and for SSCI action to be such that the bill will be placed on the calendar.

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2. Snider is unsure what action will be taken, but does believe that a number of Members of Congress would like to see the bill passed. He also stated that he believes Senator Boren (D., OK) feels strongly enough about the bill that he intends to take up the matter personally with Senator Glenn.

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Legislation Division
Office of Congressional Affairs

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OCA/Leg/ [] (17 June 1987)

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STATEMENT OF DAVID P. DOHERTY

GENERAL COUNSEL

CENTRAL INTELLIGENCE AGENCY

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. LET ME BEGIN BY STATING THAT THE CENTRAL INTELLIGENCE AGENCY JOINS THE DEPARTMENT OF STATE AND THE DEPARTMENT OF JUSTICE IN STRONGLY OPPOSING H.R. 1013. WE SHARE THEIR VIEW THAT THE PROPOSED LEGISLATION NOT ONLY WOULD IMPERMISSIBLY INTRUDE ON THE PRESIDENT'S AUTHORITY IN FOREIGN AFFAIRS BUT ALSO, AS A POLICY MATTER, IMPROPERLY WOULD DENY HIM THE NECESSARY FLEXIBILITY TO MEET INCREASINGLY SOPHISTICATED THREATS TO OUR NATIONAL SECURITY AND THAT OF OUR FRIENDS AND ALLIES. WE BELIEVE THAT THE SYSTEM NOW IN PLACE ACCEPTABLY RECONCILES THE CONSTITUTIONAL AUTHORITIES OF THE EXECUTIVE AND LEGISLATIVE BRANCHES.

LET ME FIRST BRIEFLY DESCRIBE THE CURRENT SYSTEM. I SHOULD LIKE TO CLARIFY FOR THE RECORD THE COMPREHENSIVENESS OF THE CIA'S EFFORTS TO FACILITATE MEANINGFUL OVERSIGHT BY THIS COMMITTEE, AND ITS COUNTERPART IN THE SENATE, OF THE NATION'S COVERT ACTION PROGRAMS. THE IRAN ARMS TRANSFERS STAND AS AN EXCEPTION TO THIS ADMINISTRATION'S PRACTICE. WHATEVER THE COMMITTEE'S CONCERNS ABOUT THAT EXCEPTION, THE COMMITTEE SHOULD NOT LOSE SIGHT OF THE BASIC PRACTICE.

IN HIS MARCH 31ST MESSAGE TO CONGRESS, THE PRESIDENT SAID HE "WELCOME(S) THE CONGRESS'S OVERSIGHT ROLE (IN THE INTELLIGENCE FIELD) AS IT HAS DEVELOPED IN THE LAST DECADE." THE RECORD OF THE PAST SIX YEARS -- AND OF THE NOTIFICATIONS, REPORTS, BRIEFINGS, AND TESTIMONY ON COVERT ACTION PROVIDED BY THE CIA FOR THE BENEFIT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE AND THE SENATE SELECT COMMITTEE ON INTELLIGENCE -- IS EVIDENCE OF THE PRESIDENT'S COMMITMENT "TO MAKE THE CONGRESSIONAL OVERSIGHT PROCESS WORK." BY ITS VERY NATURE, THAT RECORD CANNOT -- IN ANY DETAILED WAY -- BE MADE PUBLIC. WE CAN, OF COURSE, PROVIDE A CLASSIFIED ANNEX TO THIS TESTIMONY DETAILING OUR PERFORMANCE IN THIS AREA. THE CHRONOLOGY OF THE ADMINISTRATION'S CONSULTATIONS WITH CONGRESS POINT UP THE ABUNDANT SUCCESSES OF THE CURRENT STATUTORY SCHEME. IT ALSO DEMONSTRATES THE CARE, AS THE TOWER BOARD FOUND, WITH WHICH EXECUTIVE BRANCH PROCEDURES HAVE BEEN DRAWN TO ENSURE THAT RESPONSIBLE COMMITTEES OF CONGRESS ARE KEPT "FULLY AND CURRENTLY INFORMED" OF COVERT ACTION PROGRAMS.

THERE APPEARS TO EXIST A WIDESPREAD MISPERCEPTION OF THOSE PROCEDURES. I SHOULD LIKE TO SET THE RECORD STRAIGHT. AT THE INITIATION OF A COVERT ACTION, THE CIA ROUTINELY PROVIDES THIS COMMITTEE AND THE SENATE SELECT COMMITTEE ON INTELLIGENCE WITH THE FULL TEXT OF THE PRESIDENTIAL FINDING THAT THE CONTEMPLATED ACTION IS IMPORTANT TO THE NATIONAL SECURITY. THE CIA ALSO PROVIDES ACCOMPANYING PAPERS SETTING FORTH THE SCOPE OF A PROPOSED OPERATION AND OTHER BACKGROUND INFORMATION. ONCE A PROGRAM IS INITIATED, THE CIA PROVIDES PERIODIC BRIEFINGS ON THE CONDUCT AND EFFECTIVENESS OF THE COVERT PROGRAM IN QUESTION. THE CONGRESSIONAL INTELLIGENCE COMMITTEES ARE

INFORMED WHEN AND IF EVENTS DICTATE SIGNIFICANT CHANGES IN PROGRAMS AS WELL AS OF SUCCESS AND FAILURE. THEY THUS ARE INFORMED BOTH AT THE INCEPTION AND THEN PERIODICALLY DURING THE LIFE OF A PROGRAM UNTIL THE PRESIDENT CANCELS A FINDING.

MY IMPRESSION IS THAT, ALTHOUGH THERE ARE SOME AREAS OF DISAGREEMENT, THERE IS A FAIR CONSENSUS BETWEEN THIS COMMITTEE AND THE CIA OVER HOW THE OVERSIGHT RESPONSIBILITIES CAN BE ACCOMMODATED. A CHRONOLOGY OF CONGRESSIONAL NOTIFICATIONS AND BRIEFINGS WOULD SHOW THE EXTENT OF OUR CONSULTATION EFFORTS. IN FACT THE CIA PROVIDES CONGRESS EVEN MORE INFORMATION ABOUT THE DETAILS OF COVERT ACTIONS THAN IT PROVIDES TO MOST PEOPLE WHO ARE ACTUALLY ENGAGED IN THE OPERATIONS THEMSELVES.

THE ISSUES PRESENTED BY H.R. 1013 ARE NOT NEW, BUT WERE THOROUGHLY CONSIDERED DURING DELIBERATIONS ON THE INTELLIGENCE OVERSIGHT ACT OF 1980.

THE MOST DIFFICULT ISSUE BETWEEN THE EXECUTIVE AND THE LEGISLATURE WHEN CONSIDERING THE INTELLIGENCE OVERSIGHT ACT OF 1980 WAS THE QUESTION OF PRIOR NOTIFICATION, WITH THE EXECUTIVE ASSERTING ON CONSTITUTIONAL GROUNDS THAT THE PRESIDENT COULD DELAY NOTIFICATION. THE COMPROMISE THAT WAS WORKED OUT WAS THAT PRIOR NOTIFICATION OF THE OVERSIGHT COMMITTEES WOULD BE THE NORM, BUT THAT THERE WOULD BE ALLOWANCE FOR EXCEPTIONAL CIRCUMSTANCES.

ON THE QUESTION OF THE PRESIDENT'S CONSTITUTIONAL PREROGATIVE TO DELAY NOTIFICATION, THE CONGRESS CHOSE NOT TO CHALLENGE THAT CONSTITUTIONAL AUTHORITY IN THAT BILL, AND THEREFORE ADDED SECTION 501B. THIS SECTION TAKES INTO ACCOUNT THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO DELAY NOTIFICATION AND SETS FORTH THE CIRCUMSTANCES UNDER WHICH HE SHOULD REPORT AFTER DELAYING NOTIFICATION. THIS IS AN IMPORTANT POINT BECAUSE OF THE VIEW EXPRESSED BY SOME IN RECENT MONTHS THAT THE PRESIDENT'S DECISION NOT TO PROVIDE ADVANCE NOTICE OF THE IRAN OPERATIONS WAS A VIOLATION OF SECTION 501. THIS SIMPLY IS NOT THE CASE. ALTHOUGH LEGISLATIVE HISTORY SURROUNDING CONSIDERATION OF THE OVERSIGHT ACT MAKES CLEAR THAT IT WAS ACKNOWLEDGED BY ALL CONCERNED THAT NOTIFICATION WOULD BE DELAYED ONLY IN THE MOST EXTREME CASES. IN FACT, THE COMMITTEES HAVE RECEIVED ADVANCED NOTIFICATION OF EVERY PRESIDENTIAL FINDING BUT FOR THE TWO INVOLVING THE ATTEMPTED RESCUE OF OUR HOSTAGES IN IRAN IN 1979-1980 AND THE NSC INITIATIVE IN 1985 AND 1986.

THE EXECUTIVE BRANCH'S POSITION ON THIS CRITICAL ISSUE OF NOTIFICATION IS UNCHANGED, AND, WE THEREFORE, OPPOSE THE PROVISIONS OF H.R. 1013. THE ADMINISTRATION WILL DO EVERYTHING REASONABLE TO RESPOND TO THE REQUIREMENTS OF CONGRESSIONAL OVERSIGHT, BUT THE PRESIDENT MUST PRESERVE REASONABLE FLEXIBILITY FOR DEALING WITH UNFORESEEABLE FUTURE CONTINGENCIES. AS THE TOWER BOARD NOTED, "THERE IS A NATURAL TENSION BETWEEN THE DESIRE FOR SECRECY AND THE NEED TO CONSULT CONGRESS ON COVERT OPERATIONS." THAT TENSION HAS ALWAYS EXISTED. WE DO NOT BELIEVE THAT THE LEGISLATION, HOWEVER WELL INTENTIONED, WILL REDUCE THAT TENSION. AS CONGRESSMAN BOLAND REMARKED

AT THE TIME THE CURRENT LAW WAS PASSED, THE CONGRESS LEFT THE CONSTITUTION AS IT FOUND IT. IT IS MY VIEW THAT THE PRESIDENT'S CONSTITUTIONAL PREROGATIVES CAN'T BE TAKEN AWAY BY STATUTE, AND I UNDERSTAND THAT THE DEPARTMENT OF JUSTICE IS SUBMITTING A SEPARATE LETTER TO SET FORTH THE CONSTITUTIONAL OBJECTIONS TO THE STATUTE. AN ATTEMPT TO REMOVE THOSE AUTHORITIES WOULD SIMPLY INCREASE THE TENSION IN THIS AREA IN SITUATIONS WHERE FLEXIBILITY IS MOST NEEDED. INSTEAD, WE SHOULD, AS THE CURRENT LAW CONTEMPLATES, CONTINUE TO ATTEMPT TO WORK OUT DIFFERENCES IN "A SPIRIT OF COMITY AND MUTUAL UNDERSTANDING."